United States Court of Appeals

for the Second Circuit

ADDENDUM

Corrected

77-7228

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES COURT OF APPEALS
APR 28 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

HALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORPORATION and E. I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees.

B P/S

ADDENDUM TO PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING EN BANC

NETTER DOWD NESS ALFIERI & STERN
General Counsel for Plaintiffs-Appellants
660 Madison Avenue
New York, New York 10021
(212) 486-8600

Henry L. Bayles
Richard Ne[illegible]
Leo Brady
Arthur B. Netter
Of Counsel

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

In The

United States Court of Appeals

For The Second Circuit

Docket No. 77-7228

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORP. and E. I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees.

ADDENDUM TO PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING *EN BANC*

The following was inadvertently omitted from the proof and printing of the plaintiffs-appellants' petition for rehearing intended to have been included following the first paragraph of page 4 of the petition (before Point I):

(C) The statutory authority under the New York Business Corporation Law does not require a monetary recovery as a basis for the award sought.

The pertinent portions of §626 of that statute provides that:

"(a) An action may be brought in the right of a domestic or *foreign* corporation to procure a judgment in its favor, by a holder of shares . . . of the corporation . . ."

"(e) If the action on behalf of the Corporation was successful, in whole or in part, *or if anything was received* by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the Court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorneys' fees . . ." (emphasis supplied). This statute does not require that plaintiff receive a monetary benefit as a prerequisite to the award of attorney's fees and expenses. Since as a result of *Gottesman,* the plaintiffs and all other stockholders of General Motors received for the first time an independent accounting of du Pont's self-dealing sales, they are entitled to an award of reasonable expenses, including reasonable attorneys' fees under §626 of the New York Business Corporation Law.

The reliance by this Court on Section 4 of the Clayton Act, in its denial of the award of attorneys' fees and disbursements was misplaced.

Our application for the award is based primarily on the common law counts for du Pont's breach of a fiduciary

obligation (*infra*, p. 10), and the provisions of §626 of the New York Business Corporation Law (which are substantially similar to Delaware law), and the Delaware decisions and other authorities cited furnish full support for the granting of such an award.

Respectfully submitted,

NETTER DOWD NESS
ALFIERI & STERN
General Counsel for Plaintiffs-Appellants

Henry L. Bayles
Richard Netter
Leo Brady
Arthur B. Netter
Of Counsel

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

Court of Appeals-Second Circuit

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants,

- against -

GENERAL MOTORS CORPORATION and E.I. DUPONT de NEMOURS & COMPANY,
Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Richard A. Freund, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 84-05 First Avenue, North Bergen, New Jersey 07047. That on the 20 *day of* April *19*73 *deponent served the annexed* Addendum to Petition

upon Covington & Burling Esq. *attorney(s) for*

in this action, at 333 16th St. N.W. Washington D.C.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 20th *day of* April *19*73

Richard A. Freund

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

COURT OF APPEALS-SECOND CIRCUIT

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants,

- against -

GENERAL MOTORS CORPORATION and E.I. DU PONT de NEMOURS & COMPANY,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, JAMES A. STEELE *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street, New York, New York

That on the 20th *day of* April *19*73 *at* 767 Fifth Ave. N.Y.

deponent served the annexed Addendum to Petition *upon*

John J. Higgins - Edward B. Wallace Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney *herein,*

Sworn to before me, this 20th *day of* April *19* 73

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1975